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No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR ARNALDO RAFAEL VICENTE INFANTE-CABRERA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the only means of demonstrating that a forfeited Rule 11 error satisfies the "affects substantial rights" prong of the plain error standard is to establish that but for the Rule 11 error the defendant would not have pled guilty.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS II

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

A. The Government Improperly Seeks To Use This Case To Decide Issues Not Raised By Its Petition That Are Presented In *Infante* 6

1. The Narrow Question Before The Court Relates To The Definition Of "Affects Substantial Rights" Under The Plain Error Standard In Rule 11 Cases 6

2. The Government's Brief Improperly Raises Several Issues From The *Infante* Petition That Are Not Fairly Presented By This Case, Contrary To Its Opposition To The *Infante* Petition 7

B. The Government's Proffered Reason for Granting Certiorari In *Benitez* Mischaracterizes The Existing Plain Error Jurisprudence 10

1. The Ninth Circuit Already Applies the Government's Proposed Standard 10

2. The Alleged Circuit Split Is Illusory 11

3. The Plain Error Analysis Employed By The Ninth Circuit Is Consistent With This Court's *Olano* Decision, And With Constitutional Safeguards and the Mandate of Rule 11 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Brady v. United States,
397 U.S. 742 (1970) 19

Chapman v. California, 386 U.S. 18 (1967) 9

Hill v. Lockhart,
474 U.S. 52 (1985) 20

Long v. United States,
883 F.2d 966 (11th Cir.1989) 14

United States v. *Dixon*,
308 F.3d 229 (3d Cir. 2002) 12

United States v. Fuentes-Mendoza,
56 F.3d 1113 (9th Cir. 1995) 11

United States v. Harrington,
354 F.3d 178 (2nd Cir. 2003) 19

United States v. *Johnson*,
1 F.3d 296 (5th Cir. 1993) 12

United States v. Johnson,
520 U.S. 461 (1997) 16

United States v. Luna-Orozco,
321 F.3d 857 (9th Cir. 2003) 10, 14

United States v. *Lyons*,
53 F.3d 1321 (D.C. Cir. 1995) 11

United States v. *Martinez*,
277 F.3d 517 (4th Cir. 2002) 12

United States v. *Martinez*,
289 F.3d 1023 (7th Cir. 2002) 12

United States v. McCarthy,
97 F.3d 1562 (8th Cir. 1996) 13, 20

United States v. Monroe,
353 F.3d 1346 (11th Cir. 2003) 14

United States v. *Noriega-Millán*,
110 F.3d 162 (1st Cir. 1997) 11, 12

United States v. Olano,
507 U.S. 725 (1993) ..... passim

United States v. Rose,
357 F.3d 615 (6th Cir. 2004) 14

United States v. Sanclemente-Bejarano,
861 F.2d 206 (9th Cir.1988) 10, 14

United States v. *Vaughn*,
7 F.3d 1533 (10th Cir. 1993) 13

United States v. Vonn,
535 U.S. 55 (2002) 16

United States v. *Westcott*,
159 F.3d 107 (2d Cir. 1998) 11

STATUTES

21 U.S.C. § 963 1

RULES

Federal Rule of Criminal Procedure 11 ..... 2, 6

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INTEREST OF AMICUS CURIAE[1]

Arnaldo Rafael Vicente Infante-Cabrera is a federal inmate who presently stands convicted of violating 21 U.S.C. § 963. At the trial where this conviction occurred, Mr. Infante was permitted to enter an unknowing and involuntary

[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no party other than counsel for amicus authored this brief in whole or in part, and no person or entity, other than amicus, have made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), Petitioner and Respondent have consented to the filing of this brief and appropriate letters of consent will be filed with the Clerk of the Court.

guilty plea during a confusing multi-defendant plea hearing that was tainted by numerous violations of Federal Rule of Criminal Procedure 11. After Mr. Infante's conviction was affirmed on appeal, he filed a petition for writ of certiorari with this Court raising several issues regarding the adequacy of his plea hearing and the constitutionality of his guilty plea. That petition remains pending. *See Arnaldo Rafael Vicente Infante-Cabrera a/k/a Juan Santos v. United States*, No. 03-6234 (filed Sept. 8, 2003) ("*Infante* Petition"). The *Infante* Petition was filed approximately one month after the government filed its petition in the present case. *United States v. Carlos Dominguez Benitez*, No. 03-167 (filed Aug. 4, 2003).

The *Infante* Petition raises multiple related, but much broader, plain error issues than the narrow plain error question presented by the *Benitez* case. The potential impact of the instant case on Mr. Infante's case increased significantly when the government's opening brief on the merits in this case included several issues that are not raised by the facts of the *Benitez* case (or fairly encompassed within the question accepted for review by this Court) but which are squarely presented by the *Infante* Petition. It is believed that the present amicus brief will assist the Court in better understanding those issues, as well as ensuring that the interests of similarly situated indigent defendants in the criminal justice system are adequately represented.

SUMMARY OF THE ARGUMENT

Amicus curiae files this brief for two principal reasons. First, Mr. Infante desires to inform the Court that the government's merits brief in this case seeks to broaden the scope of this Court's review far beyond the limited plain error issue raised in the government's petition, and does so in an apparent attempt to have this Court reach and resolve

important issues not presented by the instant case but clearly raised by the *Infante* Petition. Second, Mr. Infante will demonstrate that the narrow issue raised by the government's petition in this case upon which review was accepted is based on an illusory circuit split and a mischaracterization of the Ninth Circuit's holding in *Benitez*.

The only plain error issue raised or argued in the government's petition in this case concerned the application of the "affects substantial rights" prong of the plain error standard. Specifically, the government argued that the only way to satisfy that prong in Rule 11 cases is for a defendant to show prejudice by demonstrating that "but for" the alleged Rule 11 error he would not have pled guilty. The Court granted certiorari on that limited question presumably based on the government's representation that the plain error standard adopted by the Ninth Circuit and applied in *Benitez* conflicts with the overwhelming majority of other circuits, which purportedly have adopted the above "prejudice" test as the exclusive method of establishing that a Rule 11 error "affects substantial rights."

In its merits brief, however, the government either explicitly or implicitly raises at least the following additional issues that are not fairly included within the limited question accepted for review: (1) whether plea colloquy errors that transgress the "core concerns" of Rule 11 violate the Constitution and render a guilty plea unknowing and involuntary; (2) whether such errors require no showing of prejudice under the plain error standard or will be deemed presumptively prejudicial; (3) whether such errors are structural in nature and thus not subject to the plain error standard; and (4) whether the cumulative effect of multiple plea colloquy errors warrants a different standard of plain error review. None of these issues are presented in *Benitez*, none of these issues were properly raised in the government's

certiorari petition, and none of these issues are germane to the merits of *Benitez*. On the other hand, each of those issues is directly raised by the *Infante* Petition.

In opposing the *Infante* Petition, the government argued that, while that case raises the same narrow plain error question presented by *Benitez*, the *Infante* Petition presented no other issues warranting the Court's consideration. The government argued that *Benitez* was clearly a "better vehicle" for addressing the plain error question common to both cases and urged the Court to hold the *Infante* Petition pending the disposition of *Benitez*. The Court has apparently honored that request. Yet now, the government is seeking to have the Court resolve or effectively foreclose issues raised in the *Infante* Petition that the government had previously characterized as unimportant, without even informing the Court of the *Infante* Petition or its relevance. It is unfair and improper for the government to argue the merits of the *Infante* Petition in an unrelated case without giving Mr. Infante an opportunity to join the issues. It is likewise unfair to expect the respondent in *Benitez* to address new issues not previously raised in this case and not relevant to resolution of the narrow question presented by this case.

The premise of the government's position in *Benitez* is that the Ninth Circuit applied a plain error analysis that used the wrong definition of "affects substantial rights" and thereby deviated from the prejudice test allegedly required by nearly every other federal appeals court. The government is wrong on both points. To begin with, the Ninth Circuit, like other circuits, has articulated a variety of formulations when determining whether plain error affects substantial rights under the particular facts of a given case, including the very prejudice test that the government urges the Court to adopt here. The Ninth Circuit's application of the plain error

standard generally, as well as the *Benitez* panel's analysis specifically, are entirely consistent with the flexible standard contemplated in *United States v. Olano*, 507 U.S. 725 (1993), this Court's seminal plain error case.

The government's brief thus mischaracterizes the *Benitez* holding and the Ninth Circuit's plain error jurisprudence. It also wrongly asserts that the majority of circuits hold that a Rule 11 error affects substantial rights *only* if the error affected the defendant's decision to plead guilty. None of the cases cited by the government support the rigid test that it endorses. In fact, several of the cases it cites actually demonstrate that federal appellate courts employ a variety of case-specific approaches to determining whether a given Rule 11 error affected a defendant's substantial rights. Hence, the circuit split allegedly perpetuated by the *Benitez* holding is illusory.

The government's call for this Court to use the *Benitez* case to announce a bright line, overly-strict prejudice test that relies exclusively on deciding whether a defendant would not have pled guilty but for a Rule 11 error not only is not required by the case law, it is antithetical to time-honored Constitutional safeguards. Rather than furthering the core purpose of Rule 11 of ensuring knowing and voluntary guilty pleas, the prejudice test urged by the government disregards a defendant's actual awareness of the consequences of his plea in favor of an inquiry that would be mired in speculation and virtually impossible for any defendant to meet. Contrary to the express language and history of Rule 11, the government's test would permit "harmless error" findings to become the exception that swallows the rule, thereby nullifying the Rule 11 safeguards. Because the plain error standard used by the court of appeals in *Benitez* suffers from no such infirmities, the decision in *Benitez* should be affirmed and the *Infante* Petition granted.

ARGUMENT

A. The Government Improperly Seeks To Use This Case To Decide Issues Not Raised By Its Petition That Are Presented In *Infante*

1. The Narrow Question Before The Court Relates To The Definition Of "Affects Substantial Rights" Under The Plain Error Standard In Rule 11 Cases

In its petition for writ of certiorari, the government framed its first question presented in these terms: "Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred." Pet. 03-167 at (I). Consistent with that formulation, the focus of the government's petition was on demonstrating that "a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, only if it affected the defendant's decision to plead guilty." *Id.* at 19. The government specifically argued that *Benitez* was worthy of the Court's review precisely because the Ninth Circuit had not used the above prejudice test and its holding was thus "inconsistent with the position of every other court of appeals to consider the question." *Id.* at 15.

Consistent with the government's representations and argument, the Court entered an order on December 8, 2003, stating: "The petition for a writ of certiorari is granted limited to Question 1 presented by the petition." The question accepted for review was thus limited to the narrow issue presented and argued by the government's petition—*i.e.*, the formulation of the "affects substantial rights" prong. By the time the government filed its merits brief, however, it had considerably broadened its focus to address a variety of other plain error issues. As noted below, that expanded focus

seems to have come in direct response to the issues raised by the *Infante* Petition.

2. The Government's Brief Improperly Raises Several Issues From The *Infante* Petition That Are Not Fairly Presented By This Case, Contrary To Its Opposition To The *Infante* Petition

The *Infante* Petition raises several important plain error questions not raised by *Benitez*. For example, rather than raising a narrow issue concerning a particular formulation of the "affects substantial rights" prong recited in a given case, the *Infante* Petition presents the broader issue of whether there are categories of Rule 11 error for which no showing of prejudice is required or for which prejudice should be presumed. *See* Pet. 03-6324, at 18-25.

The *Infante* Petition argues that "core concern" error constitutes such a category because such error "strikes at the heart of what Rule 11 was designed to prevent—the unknowing and unintelligent waiver of constitutional rights." *See, e.g., United States v. Hernandez-Fraire*, 208 F.3d 945, 951 (11th Cir. 2000). It further argues that Rule 11 error that renders a plea unknowing or involuntary requires correction irrespective of the application of any prejudice standard. The *Infante* Petition devotes substantial attention to and argues that such error should be treated as structural in nature. Finally, the *Infante* Petition argues that a combination of plea colloquy errors can rise to the level of reversible plain error even if each error standing alone would be deemed harmless.

The government's petition in *Benitez* discussed none of these issues, whereas its merits brief now attempts to raise them all. Moreover, in its opposition to the *Infante* Petition, the government argued that, while *Infante* raises the same narrow plain error question presented by *Benitez*, the *Infante*

Petition presented no other issues warranting the Court's consideration. *See* Pet. 03-6234, U.S. Br. in Opp., at 6-12. The government argued that *Benitez* was clearly a "better vehicle" for addressing the plain error question common to both cases and urged the Court to hold the *Infante* Petition pending the disposition of *Benitez*. *See id* at 9. The Court has apparently honored that request.

From a review of the government's merits brief in this case, the government apparently has had a change of heart. For example, whereas its petition in *Benitez* merely alluded to the concepts of structural error or special categories of error requiring little or no showing of prejudice in a single footnote on page 19, *see* Pet. 03-167 at 19 n.10, the government's merits brief devotes multiple pages to refuting the argument (not made in *Benitez*) that no category of Rule 11 error can be deemed structural error or otherwise qualify for a lesser showing of prejudice under the plain error standard, *see* U.S. Br. (03-167), at 17, 22-23, 28-31.

The same is true of the case law analyzing "core concern" error under Rule 11. Where the *Infante* Petition discusses core concern cases at length, the government's *Benitez* petition made only a passing reference to that case law. Pet. 03-167 at 15-16. The same cannot be said of the government's merits brief. As with its newly addressed topic of structural error, the government now spends several pages challenging core concern arguments nowhere raised or asserted in *Benitez*. *See* U.S. Br. (03-167), at 17, 22-23, 28-31.

Although S. Ct. Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein," no reasonable argument can be made that the new plain error issues being asserted by the government are "fairly included"

in the narrow question taken by this Court for review. Rather, it is evident that the government is attempting to raise the merits of the *Infante* Petition in this case, only without bothering to tell the Court that it is doing so and without giving the Court the benefit of hearing from the petitioner in that case.

Amicus curiae urges the Court to either refuse to consider the improperly added issues in the government's merits brief and limit its decision in this case to the narrow question for which review was actually granted, or in the alternative, to join the *Infante* case with *Benitez* and consider them together while permitting petitioner in that case the equal opportunity to brief the merits. Amicus will not use the instant brief to reassert all of the pertinent plain error issues and arguments advanced in the *Infante* Petition, but instead respectfully requests the Court to review that petition and the petitioner's reply brief in the context of deciding the proper scope of the issue presented in this case. Suffice it to say that the government's arguments regarding structural error and the standards applicable to "core concern" errors lack merit and should be rejected.

Rule 11 is of such vital importance in safeguarding constitutional rights and preserving the integrity of the guilty plea process that this Court should recognize core concern errors as a special category of Rule 11 error that requires no showing of actual prejudice. Such errors should be held to be analogous to "structural error" for which reversal is automatically required. Alternatively, the seriousness of core concern violations of Rule 11 warrants that they be analyzed either under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), which requires that the government prove the error harmless beyond a reasonable doubt, or at least that they be viewed as a special category of "presumptively prejudicial" error for which the burden

should shift to the government to prove that the error did not affect a defendant's substantial rights.

B. The Government's Proffered Reason for Granting Certiorari In *Benitez* Mischaracterizes The Existing Plain Error Jurisprudence

The government's position is founded on the premise that "a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, ***only*** if it affected the defendant's decision to plead guilty." Pet. 03-167, at 19 (emphasis added). According to the government, the Ninth Circuit erred by not using those words to define the "affects substantial rights" prong in *Benitez* and has adopted an erroneous prejudice standard that is "inconsistent with the position of every other court of appeals to consider the question." *Id* at 15. However, that position mischaracterizes the Ninth Circuit's plain error jurisprudence and alleges a circuit split that is illusory.

1. The Ninth Circuit Already Applies the Government's Proposed Standard

To begin with, the Ninth Circuit, like other circuits, uses a variety of formulations to determine whether plain error affects substantial rights under the facts of a given case. Among the formulations used by the Ninth Circuit is the very prejudice test that the government urges the Court to adopt here: "To prove prejudice, Luna-Orosco must show that his plea was either unknowing or involuntary, or that he would not have pled guilty." *United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003); *see also United States v. Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir.1988) (holding Rule 11 error harmless where, because of defendant's actual knowledge, violation "could not have had any impact on the defendant's decision to plead guilty, or the fairness in holding him to that plea"), *overruled on other*

grounds, *United States v. Fuentes-Mendoza*, 56 F.3d 1113, 1114-16 (9th Cir. 1995).

The government attempts to downplay the existence of these other Ninth Circuit decisions to create the appearance, based on *Benitez*, that the Ninth Circuit is at odds with its sister circuits. Actually, however, the circuit courts have been virtually uniform in declining to invoke a "one size fits all" test based on the single prejudice criterion that the government now urges should be applicable to every type and form of Rule 11 violation.

2. The Alleged Circuit Split Is Illusory

As its premise for obtaining review, the government asserted that "the majority of circuits have held [that] a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, ***only*** if it affected the defendant's decision to plead guilty." Pet. 03-167, at 19 (emphasis added). The government contended that the D.C., First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits all endorse this prejudice test as the exclusive method of satisfying the "affects substantial rights" prong. *Id* at 15 However, the cases cited by the government do not support this view.

Rather, those cases generally show only that the circuit courts have applied that standard of prejudice in some circumstances. *See, e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995) (not describing the standard used as the "only" way to show prejudice in Rule 11 cases); *United States* v. *Noriega-Millán*, 110 F.3d 162, 167 (1st Cir. 1997) (same); *United States* v. *Westcott*, 159 F.3d 107, 112-113 (2d Cir. 1998) (same), *cert. denied*, 525 U.S. 1084 (1999); *United States* v. *Dixon*, 308 F.3d 229, 234 (3d Cir. 2002) (same); *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.) (same), *cert. denied*, 537 U.S. 899 (2002); *United*

States v. *Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (same); *United States* v. *Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002) (same).

While the cases cited above do not exclusively adopt the prejudice standard that the government now proposes, several do describe different factors or additional standards to be considered as well. For example, in *Noriega-Millan*, 110 F.3d at 166–67, the First Circuit expressly stated that a guilty plea should be set aside "for violations that implicate the 'core concerns' of Rule 11." Likewise, rather than endorsing the government's proposed test relying exclusively on actual prejudice, the Third Circuit had articulated a different test altogether: "When assessing prejudice in the context of a plea, we must 'determine if, given the entire record (including the defendant's individualized circumstances, criminal record, role in the offense, and concession for pleading guilty), it affirmatively appears [] likely that the error materially hampered his or her ability to assess the risks and benefits of pleading guilty.'" (Citation omitted; emphasis added.)

Similarly, the Fifth Circuit in *Johnson* did not mandate a test requiring strict or exclusive reliance on prejudice, but explained that appellate courts will "examine the facts and circumstances of the ... case to see if the district court's flawed compliance with ... Rule 11 ... may reasonably be viewed as having been a material factor affecting [defendant]'s decision to plead guilty." *Johnson*, 1 F.3d at 302 (citation omitted); *see also Martinez*, 277 F.3d at 527 (stating that "showing prejudice ***usually*** means demonstrating that a defendant would not have pleaded guilty absent the error") (emphasis added).

The only cases cited by the government that actually used the word "only" when describing a prejudice test are the

Eighth and Tenth Circuits, but even those cases do not fully endorse the government's overly-strict articulation of that test. In *United States v. McCarthy*, 97 F.3d 1562, 1575 (8th Cir. 1996), the Eighth Circuit stated that Rule 11 error "warrants reversal ***only*** if it had a significant influence on [the defendant's] decision to plead guilty," but the court qualified its statement (and clearly moved away from the government's proposed prejudice test) by explaining two sentences later that the error "is not harmless error if there is a realistic likelihood that the appellant pleaded guilty under the misapprehension that he could withdraw his plea if the court did not follow the government's recommendation." 97 F.3d at 1575, (emphasis added).

In *United States* v. *Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993), the Tenth Circuit decision cited by the government, the court of appeals stated that "[i]n addressing the harmless error rule of subsection 11(h), the district court's error warrants reversal only if it had a significant influence on appellant's decision to plead guilty." Thus, while the Tenth Circuit included the word "only" in its explanation, even that court did not really inquire whether "but for" the Rule 11 error the defendant would have pled guilty, as the government urges here, but rather considered whether the error had a "significant influence" on the defendant's decision to pled guilty.

It is clear from reviewing the cited authorities that the courts of appeals have not uniformly adopted or supported the extreme proposition urged by the government and do not establish the existence of a significant circuit split. Instead, the government has selectively cited isolated statements or language from those opinions as allegedly showing that a majority of courts have adopted a rigid standard that clearly does not exist.

Moreover, there are Ninth Circuit and Eleventh Circuit cases containing similar or stronger language in support of the government's proposed standard of prejudice in appropriate factual settings. *See, e.g., Luna-Orozco*, 321 F.3d at 860 (*supra*); *see also United States v. Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir.1988) (holding Rule 11 error harmless where, because of defendant's actual knowledge, violation "could not have had any impact on the defendant's decision to plead guilty, or the fairness in holding him to that plea"); *United States v. Monroe*, 353 F.3d 1346, 1356 (11th Cir. 2003) ("Monroe has not shown, or even argued, that he would not have pled guilty had he been more fully apprised of his listed right against compelled self-incrimination."); *Long v. United States*, 883 F.2d 966, 968-69 (11th Cir.1989) (where defendant pled guilty having been advised of twenty year maximum penalty if probation were revoked, but actual maximum was ten years, mistaken advice could not have induced guilty plea). Hence, the circuit split allegedly perpetuated by the *Benitez* holding is illusory.

One circuit not mentioned by the government is the Sixth Circuit, which very recently considered and expressly rejected the government's proposed prejudice test being urged in this case. *See United States v. Rose*, 357 F.3d 615 (6th Cir. 2004). *Rose* involved a challenge to a district court's failure to adequately inform the defendant of the charges against him and to ensure there was a sufficient factual basis for the charges. After acknowledging that this Court had granted review of *Benitez* specifically to address whether a defendant must prove that he would not have pleaded guilty absent a Rule 11 error, the Sixth Circuit concluded:

> This circuit has not yet imposed on defendants, who seek to obtain reversal of their convictions pursuant to guilty pleas based upon deficiencies at their Rule 11 proceedings, a requirement that they prove that they would not have pleaded guilty absent the deficiencies, and we decline to do so in this case. Instead, we conclude that the error that occurred during Rose's Rule 11 proceeding was so egregious that it prevented Rose from understanding what crime he was pleading guilty to, and thus constitutes plain error. We will not impose on Rose the burden of demonstrating that he would not have pleaded guilty absent the deficiency.

Id. at 622 n.14. It is noteworthy that the most recent circuit court to consider the government's proposed test rejected it, even though the present case had already been accepted for review. For the same reasons, this Court should reject that proposed test as well.

3. The Plain Error Analysis Employed By The Ninth Circuit Is Consistent With This Court's *Olano* Decision, And With Constitutional Safeguards and the Mandate of Rule 11

The government further contends that the Ninth Circuit's plain error analysis in *Benitez* deviates from the teachings of this Court's plain error precedent. However, that is not accurate. The Ninth Circuit applied the well-settled three-prong standard set out in *Olano*—whether there was (1) error, (2) that was plain, and (3) that affected the respondent's substantial rights. *See United States v. Benitez*, 310 F.3d 1221, 1224-25 (9th Cir. 2002). The record was clear, and the government conceded, that the district court had in fact committed plain error by failing to advise the respondent that he could not withdraw his plea if he did not

intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (*quoting North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). The government's position disregards these time-honored principles of constitutional law.

The government's proposed prejudice test is thus inimical to rudimentary due process and to fair and constitutionally proper guilty plea proceedings. By eliminating any responsibility or need for a court to determine that defendants were actually aware of the consequences of their pleas, the government is essentially trying to eviscerate the "knowing" prong of a constitutionally valid plea. However, "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

The guilty plea hearing serves as the vehicle for safe delivery and preservation of constitutionally mandated safeguards for the criminal defendants that are the focus of that proceeding. An event that resolves 95% of all federal criminal cases brought in the United States should demand more respect and allow more critical examination from appellate courts than the government's perfunctory standard would afford.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed or, alternatively, the writ dismissed as improvidently granted. In any event, this Court should decline the government's invitation to use the *Benitez* case to address the important Rule 11 and plain error issues not

presented therein or necessary to its resolution and should instead grant the *Infante* Petition.

Respectfully submitted.

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MARCH 2004

ultimately receive the sentence he bargained for. *See id.* at 1225. After carefully reviewing the entire record—including the respondent's written plea agreement—as mandated by *United States v. Vonn*, 535 U.S. 55 (2002), the Ninth Circuit concluded that there was nothing in the record adequately demonstrating that the respondent understood the consequences of his plea—*i.e.*, that he understood he was waiving the right to plead not guilty if the district court did not give him his bargained-for sentence. *See Benitez*, 310 F.3d at 1226-27.

Strictly adhering to *Olano*, the Ninth Circuit then evaluated whether the seriousness of the district court's conceded plain error warranted exercise of the appellate court's remedial discretion. Concluding that "[h]olding Benitez to his guilty plea when he was not fully aware of the consequences of the plea would constitute a miscarriage of justice," *Benitez*, 310 F.3d at 1227, the court of appeals exercised its discretion to grant relief. *See Olano*, 507 U.S. at 732 (observing that plain error should be corrected to prevent a miscarriage of justice); *United States v. Johnson*, 520 U.S. 461, 470 (1997) (same).

Rather than being inconsistent with the Court's plain error jurisprudence, the Ninth Circuit in *Benitez* employed the very analysis taught by *Olano* and its progeny. At most, the government takes issue with certain language the *Benitez* court used to describe the "affected substantial rights" prong of *Olano*. The Ninth Circuit held that the respondent could show his substantial rights were affected by showing "that the [district] court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." *Benitez*, 310 F.3d at 1225. According to the government, the Ninth Circuit was required under *Olano* to determine if respondent's substantial rights were affected

only by asking whether the respondent would have pled not guilty but for the district court's Rule 11 error.

Olano does not mandate the prejudice test advocated by the government. In fact, *Olano* properly does not mandate any prejudice test at all. Instead, this Court recognizes that there may be certain categories of error for which no showing of prejudice will be required. *See* 507 U.S. at 734-35. The Court in *Olano* concluded by observing that it "need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'" *Id.* at 735. *Olano* did explain that "in most cases [affect substantial rights] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.* But this Court never imposed any unique or solitary standard for making such a determination, and nothing in the text of the opinion supports the government's argument that *Olano* mandates its proposed version of the prejudice test.

Consequently, to the extent that *Olano* establishes a prejudice test for those cases where a showing of prejudice is necessary to establish Rule 11 error warranting relief, that test only requires a showing that the asserted error "affected the outcome of the district court proceedings." *Id.* One obvious way to determine if a Rule 11 error had an effect on the outcome of the plea proceeding is for the reviewing court to determine whether the defendant received harsher penalties than those to which he or she agreed to be subjected when pleading guilty. This is what occurred in *Benitez*. An even more fundamental way to show that plain Rule 11 error had an effect on the outcome of a plea proceeding is to determine whether the district court's failure to provide required Rule 11 warnings led to the entry of an unknowing and involuntary guilty plea. That too occurred in *Benitez*. The "cause" was the district court's failure to take the statutorily mandated steps of ensuring that the respondent

understood the consequences of the plea he was making. The "effect" was the entry of a plea that was not knowing and voluntary. Hence, the court of appeals simply realized that there is no reasonable basis for arguing that the district court's Rule 11 error in *Benitez* did not affect the outcome of the respondent's "proceedings."

According to the government, appellate courts should be required to turn a blind eye to such obvious effects on the outcome of a plea proceeding and focus narrowly on deciding whether the outcome of the defendant's individual plea-making decision would have been affected by the plea colloquy error. Thus, under the government's proposed test, an error will have "affected the outcome" only if the defendant would not have pled guilty absent the error. This view ignores the plain language of *Olano* that indicates that courts should look to the outcome "***of the district court proceedings***," 507 U.S. at 734, not the outcome of a particular subjective decision by the defendant that takes place during the course of those proceedings.

Moreover, the government's proposed rule would require appellate courts to ignore the existence of obvious error and prejudice in cases such as *Benitez* in favor of engaging in a highly speculative, unreliable, post hoc assessment of how Rule 11 error might have affected the subjective thought processes and motivations of a criminal defendant. Such a proposal would be entirely unworkable and of dubious merit. Just as paramedics should not base their decision on whether to render aid by guessing what the injured party might have done under different circumstances to avoid or minimize the injuries actually suffered, courts should not be limited when exercising their discretion to remedy plain Rule 11 error to deciding only whether the defendant likely still would have pled guilty. At its core, the approach urged by the government can never amount to more

than a judicial guess bordering on being mere hindsight speculation. This would do violence to the long-held notion that a guilty plea is "a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970).

The advisory committee's notes to the 1983 amendments to Rule 11 emphasized that Rule 11(h)'s harmless error provision "should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards." *See United States v. Harrington*, 354 F.3d 178, 184 (2nd Cir. 2003) ("whether an error was in fact harmless because it did not prejudice the defendant must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind") (internal citation omitted). The practical impact of adopting the government's prejudice test will be to find virtually all Rule 11 error harmless. Such a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with ... the rules of fundamental justice." *Olano*, 507 U.S. at 732 (*quoting Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

Finally, the government's proposed approach disregards the constitutional mandate of a knowing and voluntary plea. Any plea colloquy error that leads to entry of an unknowing and involuntary plea is, by definition, violative of the Constitution and thus prejudicial. Whether a defendant's ultimate decision to plead guilty would change in the absence of such prejudice should not be relevant, much less determinative, when it comes to protecting such important concerns. As this Court has emphatically stated: "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and